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DINESH KANAVAJI KANAWAGI & ANOR v. RAGUMAREN N GOPAL; MAJLIS PEGUAM (INTERVENER)

FEDERAL COURT, PUTRAJAYA
MD RAUS SHARIF CJ
B AHMAD MAAROP CJ (MALAYA)
AZAHAR MOHAMED FCJ
ZAHARAH IBRAHIM FCJ
PRASAD SANDOSHAM ABRAHAM FCJ
[CIVIL APPEAL NO: 02(F)-65-10-2015 (W)]
C 29 NOVEMBER 2017

LEGAL PROFESSION: *Roll of Advocates and Solicitors – Struck off – Appeal against – Disciplinary Board made order for appellants to be struck off Rolls of Advocates and Solicitors at conclusion of disciplinary proceedings – Allegation of*
D *serious misconduct – Whether Disciplinary Committee forwarded record of investigation proceeding to Director of complaints as required by r. 26(2) of Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 – Whether Disciplinary Committee's report complied with provisions of Legal Profession Act 1976 – Whether power to call persons to give oral*
E *evidence vests with Disciplinary Committee – Whether procedure conducted by Disciplinary Committee fair – Whether appellants must be judged by peers – Whether alleged unlawful acts committed in professional capacity – Whether conduct unbefitting of advocate and solicitor within definition of 'misconduct' – Legal Profession Act 1976, s. 94(3)(o) – Whether recommendation to be struck off*
F *Roll harsh – Principle of proportionality in meting out sentences – Whether applicable*

WORDS & PHRASES: *'in a professional capacity or otherwise' – Legal Profession Act 1976, s. 94(3) – Whether word 'otherwise' wide enough to include acts or omissions in any capacity other than as advocate and solicitor*

G ***WORDS & PHRASES:*** *'misconduct' – Legal Profession Act 1976, s. 94(3) – Whether includes circumstances set out in s. 94(3)(a) to (o) – Whether conduct unbefitting of advocate and solicitor within definition of 'misconduct'*

The first and second appellants were ordered to be struck off the Rolls of
H Advocates and Solicitors by the Disciplinary Board ('DB') at the conclusion of the disciplinary proceedings taken against them under the Legal Profession Act 1976 ('LPA'). The appellants were both partners of Messrs Khana & Co ('Khana & Co'). The respondent was the complainant in the disciplinary proceedings taken by the DB against the appellants. The complaint was made by the respondent on behalf of one Saling, an Orang Asli and beneficiary of
I the Lembah Linggui Valley Trust Fund ('trust fund'). Saling and other Orang Asli from three villages had obtained judgment against the Johor State Government who was ordered to pay compensation for the acquisition of their ancestral land. Khana & Co were the solicitors representing the said

beneficiaries in the claim regarding the compensation. Pursuant to that judgment, a total sum of RM38.5 million was paid out to Khana & Co by the Johor State Government. Subsequently, the respondent was appointed to represent the Orang Asli who alleged that they could not obtain any details nor any correct financial information from the trustees which included the second appellant with regards to the compensation monies. The respondent filed a suit ('Saling suit') against, *inter alia*, the second appellant and Khana & Co for breach of trust and constructive trust in request of the compensation monies. The Judicial Commissioner ('JC') had granted the Orang Asli interim relief as follows (i) suspension of the second appellant as the trustee of the trust fund; (ii) to restrain the second appellant and Khana & Co from dissipating the trust assets and the judgment sum; and (iii) to appoint a receiver and manager ('R&M') to manage the trust and to investigate into matters pertaining to the compensation monies. The appellants' appeal against the interim relief was dismissed by the Court of Appeal and their leave application at the Federal Court was withdrawn. The respondent thereafter lodged the complaint with the DB on behalf of Saling against the appellants and two others, pertaining to the withdrawal and unlawful use of the RM7 million of the trust fund monies, which amount was allegedly used for the appellants' benefit and enrichment and not for the benefit of the Orang Asli. It was alleged that both the appellants had unlawfully utilised the said sum of 7 million to increase the paid up capital of Virgin Properties Sdn Bhd ('VPSB') in which both the appellants were shareholders and the first appellant was a director. According to the respondent, both the appellants failed to discharge their duties with honesty, ethics and responsibility. The appellants claimed, *inter alia*, that (i) the second appellant was acting in his capacity as a trustee and not as an advocate and solicitor, within the powers conferred on him under the trust deed and could not therefore be cited for misconduct; and (ii) the first appellant was acting in his personal capacity as a shareholder and director of VPSB, and not as an advocate and solicitor, and could not therefore be cited as misconduct. The Disciplinary Committee ('DC') held that there was valid and sufficient merit in the complaint against the appellants and that they had committed a serious misconduct unbefitting of advocates and solicitors pertaining to the trust and the trust property. The appellants' appeal against the said decision to the High Court and the Court of Appeal were dismissed. Hence, this appeal. The issues that arose were (i) whether the DC did not keep a record of proceedings of the inquiry and failed to forward the record of investigation proceeding to the Director of Complaints as required by r. 26(2) of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 ('the Rules'); (ii) whether uncertified notes of proceedings put in by the Malaysian Bar in its affidavit in the proceedings in the High Court were considered by the High Court. The Court of Appeal in its judgment did not consider this issue; (iii) whether the complaints to the DB was made by the

respondent, in his capacity as an advocate and solicitor for and on behalf of Saling and during the DC hearing Saling was not present to give evidence or be subject to cross examination and the DC had permitted and accepted the respondent to assume the role of the complainant; (iv) whether the DC, in coming to its conclusion, relied on an interlocutory judgment by Vernon Ong JC (then) (given on a burden of serious question to be tried); (v) whether none of the complaints by Saling was proven on a standard of proof of beyond reasonable doubt; and (vi) whether the DB/DC had no jurisdiction to register/set up and inquire into this complaint for the acts complained of were acts done by the appellants not in their professional capacity or otherwise.

Held (allowing first appellant's appeal in part; dismissing second appellant's appeal)

Per Prasad Sandosham Abraham FCJ delivering the judgment of the court:

(1) Section 103(2) of the LPA provides the powers afforded to the DC in carrying out its inquiry and it remains the prerogative of the DC whether to call any person to give oral evidence if it deems necessary. The DC pursuant to s. 103C of the LPA after the conclusion of its inquiry should record its findings in relation to the facts of the case and make recommendations to the DB as the section so provides. The report of the DC had findings of liability, a consideration of all the evidence and documents placed before it and the DC's recommendations. The DC report complied with the relevant provisions of the LPA and all the relevant facts had been recorded. A proper record of proceedings had been forwarded to the Director of Complaints to be forwarded to the DB in accordance with the provisions of the LPA and the rules and regulations made thereunder. Furthermore, r. 26 of the Rules 1994 does not prescribe the form of the record of proceedings to be kept by the DC. The requirement in s. 103 (1A) for the DC to keep notes of proceedings was inserted into the LPA on 13 June 2014 after the DC's proceedings, and therefore was not applicable to this case. The DB had duly considered the DC's report and affirmed the recommendations of the DC. Therefore, this court was unable to agree with this ground of the appellants and there was no merit in the argument. (paras 7-10)

(2) The power to call persons before it to give oral evidence in relation to the matter vests with the DC. If the DC felt the actual complainant was needed to give oral evidence then it was the prerogative of the DC to call the actual complainant to testify. If it had called Saling to give oral evidence and the DC refused to allow the appellants the right to cross examine him, then the appellants would have a valid ground to raise. The DC was perfectly entitled to rely on the documents before it to come to its findings and recommendations. Scrutinising the report of the DC, there was nothing to indicate unfairness in terms of procedure and the manner in which the DC conducted itself. (para 14)

(3) Section 94(3) of the LPA sets out instances which constitute misconduct in a professional capacity and the punishments to be meted out are found in s.103C(1) of the LPA. The standard of proof is that of beyond reasonable doubt in view of the quasi-criminal nature of these proceedings. Perusing through the DC report and its recommendations, there appeared to have been no reference to the higher standard of proof required. The appellants' peers as the DB and the DC are the best persons to decide on the misconduct of the appellants and whether the standard of proof in any given case had been met. The DC had made findings of fact that led to the principal finding of misconduct. The courts should be slow to interfere with the findings of the DC affirmed by the DB as that function must rest solely with the DC as the appellants must be judged by their peers, as encapsulated in the LPA. (paras 16-18)

(4) This court had considered the report of the DC and found that there were no compelling grounds to interfere with its findings. In assessing misconduct, the DC was perfectly entitled to rely on observations made by the judge in the High Court bearing in mind that the DC was conducting an inquiry into the alleged misconduct of the appellant. The Court of Appeal had not exceeded its jurisdiction in not interfering with the findings of the DC and the DB, and this would not warrant a curial intervention. (paras 23-25)

(5) The word 'otherwise' in the phrase 'in a professional capacity or otherwise' under s. 94(3) of the LPA is wide enough to include acts or omissions in any capacity other than as an advocate and solicitor. The term 'misconduct' is expanded in meaning to include the circumstances set out in paras (a) to (o) of s. 94(3) of the LPA. When you are a practising advocate and solicitor, and you act as a trustee or a director of a company and allegations of breach of trust and/or fiduciary duty and/or of conspiracy are levelled against you, then if the DC finds you guilty of conduct unbefitting of an advocate and solicitor in relation to such trust and/or duty (s. 94(2) of the LPA), you would certainly come within para (o) of s. 94(3) of the LPA. Under that paragraph, conduct which is unbefitting of an advocate and solicitor comes within the definition of 'misconduct.' The appeal of the second appellant was dismissed. (paras 29 & 30)

(6) As to the first appellant, having given due consideration to the first appellant's role in the scheme, the principle of proportionality in meting out sentences applied. The DB and the DC were harsh in their recommendation and order that the first appellant be struck off the Rolls. The DC, in recommending the punishment to be meted out, ought to give brief reasons as to why the DC had recommended the particular punishment meted out bearing in mind the DC had options available, and the courts must be in a position to examine the same to decide

whether the pendulum for punishment had swung too far in favour of striking off the Rolls. Therefore, the order of the DB was to be varied to read that the first appellant be suspended from practice for a period of five years. (paras 31, 33, 34 & 35)

Bahasa Malaysia *Headnotes*

Perayu pertama dan kedua diperintah agar disingkirkan daripada Daftarai Peguam Bela dan Peguam Cara oleh Lembaga Tatatertib ('LT') pada akhir prosiding tatatertib yang diambil terhadap mereka bawah Akta Profesion Undang-Undang 1976 ('APU'). Kedua-dua perayu adalah rakan kongsi Messrs Khana & Co ('Khana & Co'). Responden adalah pengadu dalam prosiding tatatertib yang dilaksanakan oleh LT terhadap perayu-perayu. Aduan dibuat oleh responden bagi pihak Saling, seorang Orang Asli dan benefisiari Dana Amanah Lembah Linggui Valley ('dana amanah'). Saling dan lain-lain Orang Asli dari tiga kampung telah memperoleh penghakiman terhadap Kerajaan Negeri Johor yang diperintahkan membayar pampasan untuk pengambilan tanah nenek moyang mereka. Khana & Co adalah peguam cara yang mewakili benefisiari tersebut dalam tuntutan berkenaan pampasan. Menurut penghakiman itu, jumlah keseluruhan RM38.5 juta dibayar kepada Khana & Co oleh Kerajaan Negeri Johor. Seterusnya, responden dilantik untuk mewakili Orang Asli yang mendakwa mereka tidak memperoleh apa-apa butiran atau maklumat kewangan yang betul daripada pemegang amanah yang termasuk perayu kedua berkenaan wang pampasan. Responden, memfailkan guaman ('guaman Saling') terhadap, antara lain, perayu kedua dan Khana & Co untuk pelanggaran amanah dan amanah konstruktif dalam tuntutan wang pampasan. Pesuruhjaya Kehakiman ('PK') memberi relif sementara kepada Orang Asli seperti berikut (i) penggantungan perayu kedua sebagai pemegang amanah dana amanah; (ii) menghalang perayu kedua dan Khana & Co melesapkan aset amanah dan jumlah penghakiman; dan (iii) melantik penerima dan pengurus ('P & P') untuk menguruskan amanah dan menyiasat perkara-perkara berkaitan wang pampasan. Rayuan perayu-perayu terhadap relif sementara tersebut ditolak oleh Mahkamah Rayuan dan permohonan kebenaran untuk merayu di Mahkamah Persekutuan ditarik balik. Responden kemudiannya membuat aduan pada LT bagi pihak Saling terhadap perayu-perayu dan dua lagi, berhubung dengan pengeluaran dan penggunaan tidak sah RM7 juta wang dana amanah, yang jumlahnya didakwa telah digunakan untuk kepentingan dan pengayaan perayu-perayu dan bukan untuk kepentingan Orang Asli. Kedua-dua perayu didakwa menggunakan jumlah RM7 juta secara tidak sah untuk meningkatkan modal berbayar Virgin Properties Sdn Bhd ('VPSB') di mana kedua-dua perayu adalah pemegang saham, dan perayu pertama adalah pengarah. Menurut responden, kedua-dua perayu gagal menunaikan tugas mereka dengan jujur, beretika dan bertanggungjawab. Perayu-perayu menuntut, antara lain, bahawa (i) perayu kedua bertindak dalam kapasitinya sebagai pemegang amanah dan bukan sebagai peguam bela dan peguam cara, dalam kuasa yang diberikan

kepadanya bawah surat ikatan amanah dan tidak boleh dikatakan melakukan salah laku; dan (ii) perayu pertama bertindak dalam kapasiti peribadi sebagai pemegang saham dan pengarah VPSB, dan bukan sebagai peguam bela dan peguam cara, dan dengan itu tidak boleh dikatakan telah melakukan salah laku. Jawatankuasa Tatatertib ('JT') memutuskan bahawa terdapat merit yang sah dan memadai dalam aduan terhadap perayu pertama dan kedua dan mereka telah melakukan salah laku yang serius yang tidak sepatutnya dilakukan oleh peguam bela dan peguam cara berhubung dengan amanah dan harta amanah itu. Rayuan perayu pertama dan kedua terhadap keputusan tersebut ke Mahkamah Tinggi dan Mahkamah Rayuan ditolak. Oleh itu, rayuan ini. Isu-isu yang timbul adalah (i) sama ada JT tidak menyimpan rekod prosiding siasatan dan gagal mengemukakan prosiding rekod siasatan kepada Pengarah Aduan seperti yang dikehendaki oleh k. 26(2) Kaedah-Kaedah Profesion Undang-Undang (Prosiding Tatatertib) (Tribunal Penyiasatan dan Jawatankuasa Tatatertib) 1994 ('Kaedah-Kaedah'); (ii) sama ada nota prosiding yang belum lagi disahkan yang dimasukkan oleh Majlis Peguam Malaysia dalam afidavitnya semasa prosiding di Mahkamah Tinggi dipertimbangkan oleh Mahkamah Tinggi. Mahkamah Rayuan dalam penghakimannya tidak mengambil kira isu ini; (iii) sama ada aduan kepada LT dibuat oleh responden, dalam kapasitinya sebagai peguam bela dan peguam cara dan bagi pihak Saling dan semasa pendengaran JT Saling tidak hadir untuk memberi keterangan atau tertakluk pada pemeriksaan balas dan JT telah membenarkan dan menerima responden untuk mengambil alih peranan pengadu; (iv) sama ada JT apabila mencapai kesimpulan bergantung pada penghakiman interlokutori oleh Vernon Ong PK (pada masa itu) (yang diberi atas persoalan serius untuk dibicarakan); (v) sama ada tiada satu pun aduan oleh Saling dibuktikan pada standard bukti melampaui keraguan munasabah; dan (vi) sama ada LT dan JT mempunyai bidang kuasa mendaftar/menubuhkan dan membuat siasatan atas aduan ini kerana kelakuan dalam aduan adalah kelakuan yang dilakukan oleh perayu-perayu bukan dalam kapasiti profesional atau sebaliknya.

Diputuskan (membenarkan sebahagian rayuan perayu pertama; menolak rayuan perayu kedua)

Oleh Prasad Sandosham Abraham HMP menyampaikan penghakiman mahkamah:

(1) Seksyen 103(2) APU memperuntukkan kuasa-kuasa yang diberikan kepada JT dalam melaksanakan siasatan dan ini kekal sebagai prerogatif JT sama ada untuk memanggil siapa-siapa sahaja untuk memberi keterangan lisan jika perlu. Jawatankuasa Tatatertib, menurut s. 103C APU, selepas kesimpulan siasatan harus merekodkan dapatannya berhubung fakta kes dan membuat cadangan kepada LT seperti yang diperuntukkan seksyen. Laporan JT mengandungi dapatan liabiliti, pertimbangan semua keterangan-keterangan dan dokumen yang dikemukakan dan cadangan-cadangan JT. Laporan JT mematuhi

peruntukan relevan APU dan segala fakta relevan yang direkodkan. Rekod prosiding yang betul telah diserahkan kepada pengadu aduan untuk dikemukakan kepada LT menurut peruntukan-peruntukan APU serta Kaedah-Kaedah dan peraturan-peraturan yang dibuat. Selanjutnya, k. 26 Kaedah-Kaedah tidak menetapkan bentuk rekod prosiding untuk disimpan oleh JT. Keperluan s. 103(1A) untuk JT menyimpan nota prosiding dimasukkan dalam APU pada 13 Jun 2014 selepas prosiding JT, dengan itu tidak diguna pakai dalam kes ini. LT dengan sewajarnya mempertimbangkan laporan JT dan mengesahkan cadangan-cadangan JT. Oleh itu, mahkamah ini tidak bersetuju dengan alasan perayu ini dan tiada merit dalam hujahan.

(2) Kuasa memanggil orang untuk memberikan keterangan lisan berhubung hal perkara ini adalah pada JT. Jika JT berasa pengadu yang sebenarnya perlu memberikan keterangan lisan, adalah prerogatif JT untuk memanggil pengadu yang sebenarnya untuk memberi keterangan. Jika JT memanggil Saling untuk memberi keterangan lisan dan JT enggan membenarkan perayu-perayu hak untuk memeriksa balasnya, perayu-perayu akan mempunyai alasan sah untuk dibangkitkan. JT berhak bergantung pada dokumen-dokumen di hadapannya bagi mencapai dapatan dan cadangan. Meneliti laporan JT, tiada apa-apa yang menunjukkan ketidakadilan dari segi prosedur dan cara pelaksanaan JT.

(3) Seksyen 94(3) APU memperuntukkan contoh-contoh salah laku dalam kapasiti profesional dan hukuman-hukuman yang dikenakan didapati dalam s. 103C(1) APU. Standard pembuktian adalah melampaui keraguan munasabah memandangkan sifat jenayah seperti prosiding ini. Membaca laporan JT dengan teliti dan cadangan-cadangannya, tiada apa-apa rujukan diperlukan pada standard pembuktian yang lebih tinggi. Rakan-rakan sejawat perayu-perayu seperti LT dan JT adalah pihak-pihak terbaik untuk memutuskan salah laku perayu-perayu dan sama ada standard pembuktian telah dipenuhi. JT telah membuat dapatan yang membawa kepada penemuan utama salah laku. Mahkamah agak perlahan untuk campur tangan dapatan-dapatan JT yang disahkan oleh LT kerana fungsi itu hanya ditangani oleh JT kerana perayu-perayu perlu dihakimi oleh rakan-rakan sejawat mereka seperti yang terkandung dalam APU.

(4) Mahkamah ini telah mempertimbangkan laporan JT dan mendapati bahawa tiada alasan kukuh untuk campur tangan dengan dapatan-dapatannya. Dalam menilai salah laku, JT berhak bergantung pada pemerhatian yang dibuat hakim di Mahkamah Tinggi mengambil kira bahawa JT menjalankan siasatan dakwaan salah laku perayu-perayu. Mahkamah Rayuan tidak melampaui bidang kuasanya apabila tidak campur tangan dapatan-dapatan JT dan LT, dan ini tidak mewajarkan campur tangan kurial.

(5) Perkataan 'otherwise' dalam frasa 'in a professional capacity or otherwise' bawah s. 94(3) APU cukup luas untuk memasukkan kelakuan atau peninggalan dalam apa-apa kapasiti selain daripada peguam bela dan peguam cara. Terma 'misconduct' diluaskan untuk memasukkan keadaan yang dibentangkan dalam perenggan (a) ke (o) s. 94(3) APU. Apabila seseorang adalah peguam bela dan peguam cara, dan bertindak sebagai pemegang amanah atau pengarah sebuah syarikat dan dakwaan pelanggaran amanah dan/atau kewajipan fidusiari dan/atau konspirasi dituduh terhadapnya, dan jika JT mendapati seseorang itu bersalah kerana berkelakuan tidak sepatutnya sebagai peguam bela dan peguam cara berhubungan dengan amanah dan/atau kewajipan yang diberi (s. 94(2) APU), dia tergolong bawah perenggan (o) s. 94(3) APU. Bawah perenggan itu, kelakuan yang tidak sesuai dengan peguam bela dan peguam cara termasuk dalam definisi 'misconduct.' Rayuan perayu kedua ditolak.

(6) Bagi perayu pertama pula, setelah memberi pertimbangan yang sewajarnya kepada peranan perayu pertama dalam skema ini, prinsip kesepadanan dalam menjatuhkan hukuman diguna pakai. LT dan JT agak keras dalam cadangan dan perintah mereka supaya perayu pertama disingkirkan daripada Daftarai. Jawatankuasa Tatatertib, dalam mencadangkan hukuman-hukuman yang perlu dijatuhkan, harus memberikan alasan-alasan mengapa JT telah memberikan cadangan hukuman sebegitu, mengambil kira JT mempunyai pilihan-pilihan lain yang sedia ada, dan mahkamah harus berada dalam kedudukan untuk memeriksa yang sama bagi memutuskan sama ada bandul hukuman mengayun terlalu jauh memihak pada penyingkiran daripada Daftarai. Oleh itu, perintah LT perlu diubah agar perayu pertama digantung daripada beramal sebagai peguam bela dan peguam cara untuk tempoh lima tahun.

Case(s) referred to:

Au Kok Weng v. Bar Committee, Pahang [1980] 1 LNS 4 ***(refd)***

Bar Council of Andhra Pradesh v. Kurapati Satyanarayana, Civil Appeal 3412 of 2001 ***(refd)***

Bolton v. Law Society [1994] 2 All ER 486 ***(refd)***

Council of the Institute of Chartered Accountants of India v. Ved Prakash Verma & Anr [Chat A Ref 5/2012] ***(refd)***

Gana Muthusamy v. Tetuan LM Ong & Co [1998] 4 CLJ 878 CA ***(refd)***

Jerald Allen Gomez v. Shencourt Sdn Bhd; Majlis Peguam (Intervenor) [2006] 1 CLJ 88 HC ***(refd)***

Law Society of Singapore v. Heng Guan Hong Geoffrey [1999] 3 SLR (R) 966 ***(refd)***

Majlis Peguam Malaysia v. Hari Krishnan Jeyapalan [2017] 4 CLJ 225 CA ***(refd)***

Nicole Threlfall v. General Optical Council [2004] EWHC 2683 ***(refd)***

Re A Solicitor [1956] 1 WLR 1312 ***(refd)***

Re Weare, A Solicitor [1893] 2 QB 439 ***(refd)***

Salsbury v. Law Society [2008] EWCA Civ 1285 ***(refd)***

Sundarajan Sokalingam v. Fredrick Indran XA Nicholas; Badan Peguam Malaysia (Intervener) [2015] 4 CLJ 892 CA ***(refd)***
The Law Society v. Waddingham [2012] EWHC 1519 (Admin) ***(refd)***

Legislation referred to:
Legal Profession Act 1976, ss. 94(2), (3)(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), 103B(1), (2), 103C(1)
Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, rr. 24, 26(2)

For the 1st appellant - Bastian Vendargon, Gene Vendargon & Dinesh Athinarayanan; M/s Dinesh & Co
For the 2nd appellant - Manjeet Singh Dhillon, Shopna Malakar; M/s Shopna Rani Malakar
For the respondent - Ragunath Kesavan; M/s G Ragumaren & Co
For the intervener - Lambert Rasa-Ratnam, Hoi Jack S'ng & Lilian Lee; M/s Lee Hishammuddin Allen & Gledhill

[Editor's note: For the Court of Appeal judgment, please see Dinesh Kanavaji Kanawagi & Anor v. Ragumaren N Gopal; Bar Council Malaysia (Intervener) [2016] 7 CLJ 667 (overruled in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

Prasad Sandosham Abraham FCJ:

Introduction

[1] This appeal was heard by this court on 30 August 2017 wherein the court reserved judgment. We now deliver below our decision and judgment.

Background Facts

[2] The first and second appellants were ordered to be struck off the Rolls of Advocates and Solicitors by the Disciplinary Board at the conclusion of disciplinary proceedings taken against them under the Legal Profession Act 1976 (LPA). Their appeals to the High Court and Court of Appeal were dismissed.

[3] The pertinent facts leading up to the disciplinary proceedings being commenced against the first and second appellants are elucidated from the grounds of the learned High Court Judge:

> [1] Kanawagi is the father of Dinesh and both were then partners of Messrs Khana & Co (Khana & Co).
>
> [2] The respondent is the complainant in the disciplinary proceedings taken by the DB against Kanawagi and Dinesh (appellants). The complaint was made by the respondent on behalf of one Saling bin Lau Bee Chiang, an Orang Asli from Kota Tinggi Johor, a beneficiary of the Lembah Linggui Valley Trust Fund (Trust Fund).

[3] Saling and other Orang Asli from 3 villages had on 5.6.2000 obtained judgment against the Johor State Government which was ordered to pay compensation for the acquisition of their ancestral land. Khana & Co were the solicitors representing the said Orang Asli (beneficiaries) in the claim regarding the compensation. Pursuant to that judgment, a total sum of RM38.5 million was paid out to Khana & Co by the Johor State Government.

[5] In 2005, the respondent was appointed to represent the Orang Asli who alleged that although they did receive some monies from the Trust Fund, they could not obtain any details nor any correct financial information from the Trustees which included Kanawagi with regards to the compensation monies. The respondent then, on their instruction, for an on behalf of these Orang Aslis filed a suit in the Johor Bahru High Court [Saling suit] against *inter alia* Kanawagi and Khana & Co. for breach of trust and constructive trust in request of the compensation monies. The relief sought, *inter alia*, are as follows:

(a) the explanation for the sum of RM16,554,111.92 taken from Trust monies as alleged fees and expenses;

(b) the status and explanation to the balance of RM22 million;

(c) the status and accounts of the accrued interest on the RM22 million.

[6] The learned Vernon Ong JC (as he then was) had granted the Orang Asli interim relief as follows:

(a) Suspension of Kanawagi as Trustee of the Trust Fund;

(b) To restrain the defendants (Kanawagi, Khana & Co) from dissipating the trust assests and the Judgment sum;

(c) To forthwith appoint a Receiver & Manager (hereinafter referred to as "R&M") to manage the trust and to investigate into the matters pertaining to the compensation monies;

[7] The appellants' appeal against the interim relief was dismissed by the Court of Appeal and their leave application at the Federal Court was withdrawn at the 11th hour. A subsequent application to remove the Receiver and Manager was also dismissed by the High Court as well as the Court of Appeal.

[8] On 7.3.2011, the respondent lodged the complaint with the DB on behalf of Saling against the appellants and two others. The complaint pertains to the withdrawal and unlawful use of the RM7 million of the Trust Fund monies, which amount was allegedly used for the appellants benefit and enrichment and not for the benefit of the Orang Asli. Briefly the complaint states:

A (a) Kanawagi unlawfully allowed the released of the sum of RM7 million;

(b) Both appellants unlawfully entered into a self-dealing arrangement not for the benefit of the Trust Fund or the beneficiaries of the Trust Fund;

B (c) Both appellants unlawfully utilised the sum of RM7 million (which Kanawagi claimed was used to purchase the condominiums) to increase the paid up capital of Virgin Properties Sdn Bhd (VPSB), in which both appellants are shareholders, holding about 49% of its shares and Dinesh is a director;

C (d) As advocates and solicitors, both appellants failed to discharge their duties with honesty, ethics and responsibility.

[9] The complaint in (a) is essentially based on the judgment of Vernon Ong JC (as he then was) which was affirmed by the Court of D Appeal. The complaints in (b) and (c) primarily rely on the reports of the R & M which was accepted in the judgment affirmed by the Court of Appeal. The complaints are that

(a) the sum of RM7 million purportedly used for the purchase of the condominiums was in fact utilised by VPSB to increase its paid-up share capital from RM30,000 to RM7,030,000;

E (b) at some point later a sum of RM6,999,990 left the account of VPSB as loans to its directors.

[10] In their joint letter of explanation as shown at page 329-344 of the Record of Appeal, the appellant claimed *inter alia*:

F (a) Kanawagi was acting in his capacity as a trustee and not as an advocate and solicitor, within the powers conferred on him under the Trust Deed and cannot therefore be cited for misconduct;

(b) Dinesh was acting in his personal capacity as a shareholder and G director of VPSB, and not as an advocate and solicitor, and cannot therefore be cited as misconduct. He is not a trustee and therefore cannot be said to have been involved in a self-dealing arrangement. Even if he is a trustee, the Trust Deed allows the Trustees to act notwithstanding personal interest;

H [11] The Disciplinary Committee (DC) heard the complaint on 25.4.2012 and in their report dated 4.5.2012 as shown at pages 634 to 635 of the Record of Appeal, had decided as follows:

After hearing the arguments from the complainant and the respondents and having read the complaint and the replies and having considered and studied the Johor Bahru High Court I Judgment and having read the voluminous facts and exhibits disclosed in the complaint, the Committee decides as follows:

(a) the four (4) respondents' contention that the Director of the Disciplinary Board shall not register the complaint in the registrar book on the ground that the complaint must be signed by the complainant himself i.e. Saling Bin Lam Bee Chiang and not by his solicitor is groundless. Pursuant to the Legal Profession (Disciplinary Procedure) (Investigating Tribunal and Disciplinary Committee Rules, 1984 Rule 3(1), a complaint can be made by a complainant or his solicitor. And as the complaint is made by the solicitor on behalf of the complainant, the solicitor in our view can sign on behalf of the complainant. We agree with the complainant's explanation.

(b) The 1st respondent's (Kanawagi) contention that the complaint against him for misconduct as advocate & solicitor should not be dealt with by the Disciplinary Board because he acted in his capacity as trustee and not as an advocate and solicitor is in our opinion not tenable by virtue of his standing and position as an advocate and solicitor who acted for the 52 Orang Asli in their compensation claim against the Johor State Government

The 1st respondent (Kanawagi) and his law firm M/s Khana & Co, the defendants in the Johor Bahru High Court Civil Suit, were found to have acted against the interests of the complainant and 77 others (the plaintiffs in the suit) as held by the Johor Bahru High Court. By acting against the interest of their clients, they are in breach of professional misconduct.

There is valid and sufficient merit in the complaint against the 1st and 2nd respondents (Kanawagi and Dinesh). Both cannot divorce their standing as advocates and solicitors and their personal dealings. The Committee took cognisance of his Lordship's conclusion in summing up his judgment on the serious misconduct of both respondents who acted in their professional and personal dealings unbefitting of advocates and solicitors pertaining to the trust and the trust property.

Arguments Raised By The Appellants

[4] We note that the principal grounds being canvassed by the first and second appellants duplicate themselves in the main save for some differences with regards to the second appellant. We shall deal with the same accordingly.

[5] The first ground of appeal, common to both appellants is expressed in the following terms (A) (see p. 5 of the first appellant's submissions).

DC Which Concluded The Inquiry Did Not Keep A Record Of The Proceedings Before It As Required By Rule 24 Of Rules 1994 And Did Not Forward The Record Of The Investigating Proceedings To The Director As Required Under Rule 26(2) of Rules 1994

[6] The appellants firstly argued that the Disciplinary Committee (DC) did not keep a record of proceedings of the inquiry and failed to forward the record of investigation proceedings to the director of complaints as required by r. 26(2) of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 (the Rules 1994). The respondent and the intervener (Malaysian Bar) in their respective submissions and submissions in reply point out that there was no requirement in law to do so and the requirement if at all came by way of an amendment to the LPA which was not applicable in our present appeal. We firstly set out rr. 24 and 26 of the Rules 1994:

> Record of proceedings before Disciplinary Committee
>
> 24. The Disciplinary Committee shall make a record of all the evidence given before it.
>
> Report of Disciplinary Committee
>
> 26. (1) The **report** of the Disciplinary Committee shall state the findings of fact and the recommendations of the Disciplinary Committee and shall be signed by the chairman and the members of the Disciplinary Committee.
>
> (2)The **report** of the Disciplinary Committee together with the record of investigation proceedings shall be sent to the Director within two months from the date of the appointment of the Disciplinary Committee.
>
> (emphasis added)

[7] Looking at s. 103B(1) of the LPA which we now set out *in toto*, and we quote:

> Disciplinary Committee
>
> 103B(1) The Disciplinary Board shall appoint a Disciplinary Committee to consider, in cases where an Investigating Tribunal has been appointed, the report of the Investigating Tribunal, or to investigate and make recommendations to the Disciplinary Board in respect of cases under section 103A.

it is clear to us, this exercise by the DC is one of an inquiry and what the DC is required to do is to make a finding expeditiously. Section 103B(2) of the LPA provides the powers afforded to the DC in carrying out its inquiry and it remains the prerogative of the DC whether to call any person to give oral evidence if it deems necessary. The DC pursuant to s. 103C of the LPA after the conclusion of its inquiry should record its findings in relation to the facts of the case and make recommendations to the DB as the section so provides.

[8] The appellants argued there was non-compliance with rr. 24 and 26 of the Rules 1994. The DC's report appears at p. 347 of the common core bundle (CCB) between respondent and Malaysian Bar. The report of the DC had findings of liability, a consideration of all the evidence and documents placed before it and the DC's recommendations. We find the DC report complied with the relevant provisions of the LPA and all the relevant facts had been recorded. We therefore rule a proper record of proceedings had been forwarded to the director of complaints to be forwarded to the DB in accordance with the provisions of the LPA and the rules and regulations made thereunder and we therefore are unable to agree with this ground of the appellants.

[9] We note that r. 26 does not prescribe the form of the record of proceedings to be kept by the DC. The requirement in s. 103(1A) for the DC to keep notes of proceedings was inserted into the LPA on 13 June 2014 after the DC's proceedings, and therefore not applicable to this case. We refer to a decision of the Court of Appeal in *Jerald Allen Gomez v. Shencourt Sdn Bhd; Majlis Peguam (Intervenor)* [2006] 1 CLJ 88 wherein His Lordship Abdull Hamid Embong JCA (as he then was) held:

> [5] *Where a domestic body such as the Disciplinary Committee exercises its power for which the procedures in its proceedings are not provided for by law, the Court will assume that in following its ad hoc procedure, the domestic body has exercised that power in a regular manner. The only requirement is that there be no violation of the rules of natural justice*. To say, as in the instant case, that the Disciplinary Committee should adhere strictly to the procedures as in the proceedings of a criminal court, would be to imply requirements not intended by statute. It would also entail unnecessary delay in a procedure under Part VII of the Legal Profession Act 1976, which is designed to be fairly summary.
>
> (emphasis added)

[10] We also refer to the decision of the Court of Appeal in *Sundarajan Sokalingam v. Fredrick Indran XA Nicholas; Badan Peguam Malaysia (Intervener)* [2015] 4 CLJ 892 (Civil Appeal No. A-02(IM)-821-05-2014) wherein Abdul Wahab Patail JCA held at para. 23 and we quote in agreement:

> [23] **The scheme of the LPA and its rules is that (a) there is an inquiry by the DC (s. 103B), leading to its report containing, inter alia, its findings and recommendations, being submitted to the DB, (b) the decision of the DB**, regardless whether it accepts or rejects the report, is made after a consideration of the report by the DC, and (c) if the DB intends to make an order that is likely adverse against an advocate and solicitor, he is notified of the DB's intention to do so and he is afforded a reasonable opportunity to be heard. *These are fundamental foundations for well-considered, fair and just decisions, eliminating as far as possible decisions that*

A *are precipitate, hasty, reckless, impetuous, irrational or worse, where a person is condemned and the proceedings before the DB mere exigency for it to pronounce punishment*

(emphasis added)

B The DB had duly considered the DC's report and affirmed the recommendations of the DC (refer to p. 357 common core bundle of documents (CCD) Vol 2). Therefore, we find no merit in this argument. The aforesaid Court of Appeal decision referred to above in our view reflected the correct approach the DC should take and we are in agreement with the reasoning of these two cases.

C *The High Court Failed To Apply Its Mind To The Filing Of An Affidavit By The Respondent In An Appeal Heard By The High Court From Decision Of The DB And Which Act Was To Put In An Uncertified Notes Of Proceedings From A Third Party IE, Bar Council (The Intervener Here) For The High Court To Consider And Which The High Court Did (See Page 5 Of The 1st Appellant's Submissions).*

D **[11]** Item B of the arguments by both appellants raised the point that uncertified notes of proceedings put in by the Malaysian Bar in its affidavit in the proceedings in the High Court were considered by the High Court. The Court of Appeal in its judgment did not consider this issue.

E **[12]** As we have already found that the DC has only to forwarded to the Director of Complaints, for onward transmission to the DB, its report pursuant to s. 103C of the LPA read together with r. 26 of the Rules, which had been complied with in this case, we find this issue warrants no consideration by us as the DC's report was forwarded to the DB and was F considered by the DB and affirmed. (see CCB p. 357 Vol. 3).

The Complaint To The DB Was Made By The Respondent, An Advocate & Solicitor In His Capacity As An Advocate & Solicitor For And On Behalf Of Saling Bin Lau Bee Chiang And During The DC Hearing Saling Was Not Present To Give Evidence Or Be Subject To Cross-examination And The DC Permitted And G *Accepted The Respondent To Assume The Role Of The Complainant.*

[13] The next issue ventilated by the appellants before us was tabulated in item C of their respective submissions (see p. 5 of the first appellant's submissions).

H Section 103C(1) sets out the procedure the DC needs to follow in conducting its proceedings. The DC is the "master of its own procedure" subject to statutory provisions and rules. Section 103C(1) provides:

> 103C(1) After hearing and investigating any matter referred to it, a Disciplinary Committee shall record its findings in relation to the facts of I the case and according to those facts shall determine and make any one of the following recommendations to the Disciplinary Board ...

[14] The power to call persons to appear before it to give oral evidence in relation to the matter vests with the DC. If the DC feels the actual complainant is needed to give oral evidence then it is the prerogative of the DC to call the actual complainant to testify. If it had called Saling to give oral evidence and the DC refused to allow the appellants the right to cross examine him, then the appellants would have a valid ground to raise. The DC is perfectly entitled to rely on the documents before it to come to its findings and recommendations. We refer again to the decision of the Court of Appeal in *Jerald Allen Gomez v. Shencourt Sdn Bhd; Majlis Peguam (Intervenor) (supra)* and to the judgment of Abdull Hamid Embong JCA (as he was then) at pp. 99-100 whose reasoning we agree with and we quote:

> Part VII of the LPA, and the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 do not provide for a detailed arrangement on the procedure for its hearing and investigation in a disciplinary matter. Rule 31 of the 1994 Rules however provides the chairman of the disciplinary board with powers to give directions to the disciplinary committee on the investigating tribunal on matters of procedure as he thinks fit. No such directions were given in the instant case. Rule 22 of the said Rules provides for the course of action that may be taken by the disciplinary committee in a situation where a party is absent at its hearing. It states:
>
> > 22. Absence of parties before Disciplinary Committee. Where on the date fixed for the hearing and investigation of the complaint the complainant or the advocate and solicitor concerned or both fail or fails to attend before the Disciplinary Committee, the Disciplinary Committee may, upon being satisfied that the notice of the hearing has been posted to the person or persons concerned, the hearing has been posted to the person or persons concerned. This repetition is an error in the MLJ version of the rule and unfortunately repeated in the quoted by the court proceed to hear and investigate the complaint in the absence of such person or persons without further notice to such person or persons and make its determinations and recommendations to the Disciplinary Board.
>
> It is clear therefore that the disciplinary committee may proceed to hear, investigate and determine the complaint even in the absence of either party. So there is nothing inherently irregular in reaching a decision in the absence of one of the parties, since the governing statute has provided for such a situation. The notes show that on 22 August 2002 when the representative of the respondent, one Dato' Lee Kam Yoong failed in his attempt to secure a postponement, the disciplinary committee went on to hear the appellant first. When the hearing was adjourned to the following day, Dato' Lee Kam Yoong was present and propounded the complaint against the appellant and was subsequently cross-examined by the latter. *In our view there is nothing irregular or unfair in the procedure adopted by the disciplinary committee. The proceedings although quasi-judicial in nature need not emulate the strict adversarial procedure practised in a criminal court. This is not a*

A *criminal trial but a disciplinary proceedings. So long as it is seen that "fair play is in action" to borrow Lord Morris' words, and that the procedures applied are just and fair, then, in this court's view, it cannot be said that the disciplinary committee had committed a breach of procedural fairness.*

(emphasis added)

B We have scrutinised the report of the DC and found nothing to indicate unfairness in terms of procedure and the manner in which the DC conducted itself. We would therefore dismiss this argument of the appellants.

[15] We next deal with issues raised in items D and E of the respective submissions of the appellants.

C *The DC In Coming To Its Conclusion Relied On An Interlocutory Judgment By Vernon Ong JC (then) in JB High Court Suit No. 22-228-2009 (Given On A Burden Of Serious Question To Be Tried)*

None Of The Four Complaints By Saling Was Proven On A Standard Of Proof Of
D *Beyond Reasonable Doubt (See p. 5 Of The First Appellant's Submissions).*

[16] There is only one offence for which the LPA affixes punishment on an advocate and solicitor, ie, "misconduct". Section 94(3) of the LPA sets out instances which constitute misconduct in a professional capacity and the
E punishments to be meted out are found in s. 103C(1) of the LPA. The standard of proof is that of beyond reasonable doubt in view of the quasi criminal nature of these proceedings. Perusing through the DC report and its recommendations, there appears to have been no reference to the higher standard of proof required. We are of the view that the appellants' peers as the DC and the DB are the best persons to decide on the misconduct of the
F appellants and whether the standard of proof in any given case had been met.

[17] We refer to the decision of this court in *Au Kong Weng v Bar Committee, Pahang* [1980] 1 LNS 4; [1980] 2 MLJ 89 and to the judgment of Raja Azlan Shah CJ (as His Majesty then was) at p. 91 para. G left hand column to para. A right hand column.

G

> The same point was taken before us, that there was not that high standard of proof as required in cases of this nature that the appellant had given a solicitor's undertaking in "clear, unqualified and unequivocal terms": see *Bhandari v. Advocates Committee, T. Damodaran v. Choe Kuan Him*. It was also urged before us that the appellant had merely said to
> H Mr. Balendran that as he had no authority to sign cheques etc for his father, he would speak to his father about paying on or before March, 21, and that if he had given any undertaking, there was no proof that he had given the undertaking personally, and in his professional capacity as a solicitor, in view of the father-son relationship between him and the defendant in the suit, out of which this matter arose. It is a question for
> I the committee to decide, first, whether the facts alleged in the charge had been proved beyond reasonable doubt and secondly whether the

appellant in relation to those facts, was guilty of such conduct. *The absence in the Committee's determination of any mention of the standard of proof does not justify an inference that it had failed to have regard to it. As a matter of fact that point was referred to in the very first paragraph of the appellant's written submission before the Committee and which is incorporated in page 126 of the appeal record. We have not the slightest doubt that that point was in the forefront of the committee's consideration*.

(emphasis added)

[18] The DC has made findings of fact that led to the principal finding of misconduct. The courts in our view should be slow to interfere with the findings of the DC affirmed by the DB as that function must rest solely with the DC as the appellants must best be judged by their peers as encapsulated in the LPA. We refer to the judgment of Raja Azlan Shah CJ (as His Majesty then was) in *Au Kong Weng (supra)* at p. 91 para. H to p. 92 para. A and we quote:

Where a solicitor, who is acting professionally for a client, gives his personal undertaking in that character to a third person, that undertaking may be enforced summarily, upon application to the court. Before this remedy can be pursued it must be shown that the undertaking was given personally and not merely as agent on behalf of the client; the undertaking must also be given by the solicitor, not as individual, but in his professional capacity as a solicitor.

This passage omitting unnecessary words is from *Halsbury's Laws of England* (3rd Edition) at page 195 and was cited to the Disciplinary Committee.

Statutes relating to the legal profession now entrust the supervision of advocates and solicitors' conduct to a committee of the profession, for it knows and appreciates better than anyone else the standards which responsible legal opinion demands of its own profession.

Following this trend, our Legal Profession Act 1976, has now entrusted the duty of seeing that members of the profession maintain the highest standards of probity which are demanded by a profession dealing with the rights properties and liberty of the people, to the members of the profession themselves. In our respectful view, it cannot be gainsaid that the members of the profession must be able to rely on the spoken word of each other and that a breach of this undertaking is a serious matter.

(emphasis added)

[19] We also make reference to the decision of the Court of Appeal in *Gana Muthusamy v. Tetuan LM Ong & Co* [1998] 4 CLJ 878; [1998] 3 MLJ 341 at p. 881 (CLJ); pp. 344-345 (MLJ), wherein His Lordship Gopal Sri Ram JCA (as he then was) said and we quote:

It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable

A profession. Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behavior. We would, in this context, express our agreement with the following passage in the Guide to the
B Professional Conduct of Solicitors issued by the Council of the Law Society in 1974, quoted by the learned judges of the High Court in their judgment:

> *One of the hallmarks of a developed profession is that it should lay down and maintain standards of professional conduct for its members based upon*
C *the best thinking of those members as to what constitutes proper conduct for a member of that profession.*

In our judgment, a court will be entitled to interfere only if what has been found by a Disciplinary Committee to be unprofessional conduct will not be considered to be such by the best thinking members of the profession. The present case does not come within the reach of that test and
D accordingly this appeal fails.

(emphasis added)

[20] We refer to Delhi High Court decision of *Council of the Institute of Chartered Accountants of India v. Ved Prakash Verma & Anr* [Chat A Ref 5/2012]
E by way of analogy, and to the judgment of His Lordship Justice Rajiv Sahai Endlaw which we now quote at p. 7 which we find instructive:

> 8. Though the jurisdiction of this Court under Section 21(6) of the Act is wide, without any restriction but *in our opinion, the findings of the members of the Disciplinary Committee of the petitioner and the views of the petitioner Council*
F *are entitled to great weight in light of the fact that they are the experts with regard to the matters pertaining to profession of chartered accountants and know the intricacies of the profession on account of their personal experience. Moreover, the said bodies have been created to maintain a high standard of conduct and discipline amongst the members of the petitioner institute. Thus, unless gross violation or disregard of the provisions of the Act or the Regulations made thereunder or of the*
G *principles of natural justice and fairness is to be found, this Court would be slow to interfere with the finding of such professional bodies*. Reliance in this regard can be placed on *Chief Controller of Exports, New Delhi vs. G.P. Acharya* AIR 1964 Cal. 174, *Council of the Institute of Chartered Accountants of India vs. C.H. Padliya* MANU/MP/0139/1976 and The Council of the *Institute of Chartered Accountants of India vs. B. Mukherjea* AIR 1958 SC 72 (though
H under the old Section 21).

(emphasis added)

[21] We also refer to the case of *The Law Society v. Waddingham* [2012] EWHC 1519 (Admin) a decision of the High Court of England, Queen's
I Bench Division and to the judgment of Mr Justice Maddison which we now quote at p. 14:

> 46. *Happily, the law in this regard is clear and uncontroversial, and I do not propose to embark on a detailed analysis of the authorities. In essence, when considering an appeal from a Solicitors Disciplinary Tribunal this court should accord considerable respect to the findings of and penalties imposed by the Tribunal, it being an expert and informed body; but as to the Tribunal's findings, this court is entitled to substitute its own view in an appropriate case, and it is also entitled to interfere with the Tribunal sentencing decision if it was clearly inappropriate* (See e.g. *Bolton v. The Law Society* [1994] 1 WLR 512, 516 G-H, per Sir Thomas Bingham M.R.; *Otchere v. The Law Society* [2008] EWHC (Admin.) 2233 at paragraph 18 per Lloyd Jones J.; and *Salsbury v. The Law Society* [2008] EWCA Civ. 1285 at paragraph 30, per Jackson LJ.
>
> (emphasis added)

In the decision of the High Court of England Queen's Bench Division, a decision in *Nicole Threlfall v. General Optical Council* [2004] EWHC 2683 (Admin), Mr Justice Stanley Burnton said at p. 8, and we quote:

> 21. **Because it does not itself hear the witnesses give evidence, the Court must take into account that the Disciplinary Committee was in a far better position to assess the reliability of the evidence of live witnesses where it was in issue**. In that respect, this Court is in a similar position to the Court of Appeal hearing an appeal from a decision made by a High Court Judge following a trial. There is, however, an important difference between an appeal from a High Court Judge and an appeal from a Disciplinary Committee. *The Disciplinary Committee possesses professional expertise that a High Court judge lacks. In the present case, the Committee comprised, in addition to the Chairman and a member nominated by the Privy Council, a dispensing optician, an optometrist, and an ophthalmologist. This Court appreciates that such a Disciplinary Committee is better qualified to assess evidence relating to professional practice, and the gravity of any shortcomings, and it therefore accords the decision of the Committee an appropriate measure of respect, but no more*: see *Ghosh v. General Medical Council* [2001] UKPC 29, [2001] 1 WLR 1915, at [33] and [34] and *Preiss v. General Dental Council* [2001] UKPC 36, [2001] 1 WLR 1926 at [26] to [29]. These decisions make it clear that the Court should be more ready to overrule a disciplinary tribunal than previously appeared to be the case. **It however remains the position that an appellant must establish an error, of law or fact or of judgment, on the part of the tribunal**.
>
> (emphasis added)

[22] All these cases enunciate the point that the DC and/or like bodies, being a collegiate of peers, must be allowed to make findings of fact based on their experience in the profession under any given circumstances. The court must certainly not substitute themselves into the position of the DC in its review role. It is not for the court to say on the facts that the offending solicitor is guilty of professional misconduct or otherwise. So arguments on the merits should not be enunciated by the court and strong credence must be given to the findings of the DC which after all are subject to review by the DB which also consists of peers.

[23] We have considered the report of the DC and find there are no compelling grounds to interfere with its findings. The courts should only interfere with the finding of facts and recommendations of the DC in the following limited circumstances ie,:

(i) when the findings are manifestly perverse;

(ii) the DC/DB had failed as right thinking members of the Bar to give due consideration to the facts of the case and the conduct of the solicitor complained against; and

(iii) there had been breach of natural justice.

An instance of the above is best found in the Supreme Court of India's decision of *Bar Council of Andhra Pradesh v. Kurapati Satyanarayana*, Civil Appeal 3412 of 2001, and to the judgment of Bhan J which we now quote at pp. 3-4:

> *The conduct of the Delinquent, who is an elderly gentleman, is reprehensible and is unbecoming of an advocate. It deeply pains us that the Delinquent who claimed to have practised for three decades and has worked as Government advocate for four years should have been guilty of such serious misconduct. The finding of the Disciplinary Committee of the Bar Council of India that there was no intention on the part of the Delinquent advocate to misappropriate the money of his client or to defraud him is not only unfounded and perverse but also lacks the serious thought which was required to be given by the Disciplinary Committee of the Bar Council of India in the discharge of quasi-judicial function while probing into the grave charge of professional misconduct by an advocate in the discharge of his duties as a counsel.*
>
> We find the Delinquent guilty of grave professional misconduct. Having given our anxious consideration, we feel that having regard to the serious nature of misconduct the punishment of removal of his name from roll of the Bar Council would be the only appropriate punishment and accordingly we set aside the order passed by the Disciplinary Committee of the Bar Council of India and restore that of the Disciplinary Committee of the State Bar Council.
>
> (emphasis added)

For the aforesaid reasons we would dismiss these grounds raised by the appellants.

[24] Whilst we agree that this list of exceptions set out above may not be exhaustive and is dependent on the facts of each given case, applying these principles to our case, we find that the Court of Appeal had not exceeded its jurisdiction in not interfering with the findings of the DC and the DB, and this would not warrant a curial intervention.

[25] In our view in assessing misconduct the DC was perfectly entitled to rely on observations made by the learned judge in the Johor Bahru High Court bearing in mind that the DC was conducting an inquiry into the alleged misconduct of the appellant. It is not a question of the decision in that case

rather the comments made by the learned judge as to misconduct and we now quote the relevant portions of His Lordship Vernon Ong J's (as he then was) grounds of judgment:

> [27] The R&M have been given the run-around by the defendants in their endeavour to obtain and secure the trust property. When contacted the 1st defendant said that he did not have any of the books and records of the Trust; the documents were in the custody of one Hamzah of Kota Tinggi. The 1st defendant said that he did not have Hamzah's phone number. Later he said that he was unable to contact Hamzah as the phone reception in the area was bad.
>
> When the R&M went to Hamzah's house in Petrijaya, they found the 1st defendant's son, Dinesh Kanawagi present. Hamzah told the R&M that the books and records were not with him; that he could not remember, he was uncertain and that the books and records may be in Petaling Jaya where he lived with his children. When Hamzah was told that the 1st defendant said that the books and trust records were with Hamzah, Dinesh Kanawagi who was present said he had no knowledge of such statement. However, when the 1st defendant made the statement to the R&M, Dinesh was seated next to the 1st defendant. When the R&M asked Dinesh for the 1st defendant's phone number, Dinesh said that he did not have his father's telephone number.
>
> [28] Subsequently on 24 April 2009 the 1st defendant informed the R&M that the accounts of the trust was handled by one K Siva Lingam. When contacted K Siva Lingam informed that he did not have any books, records or documents of the trust and that he worked for TCMK Associated who did the audit. TCMK Associated's role was not disclosed to the R&M by the 1st defendant. When contacted TCMK Associated informed the R&M that they did not have any books or records of the trust and that the original ledger, payment vouchers and bank statements of the trust are with the trustees.
>
> [29] The R&M have not received any documents from the defendants. All discoveries made by the R&M were made without any assistance from the defendants. The 1st defendant's excuse is that there was a fire at his office. The fire in May 2007, however, does not explain the total absence of the records for the rest of 2007, 2008 and early 2009. RM435,451.18 was withdrawn from the Agro Bank account between 12 May 2008 and 9 April 2009 with all the withdrawal slips signed by the 1st defendant and 2nd defendant. The 27 properties were purchased in 2008. Notwithstanding that these are post-fire transactions no documents have been furnished by the defendants. However, on 13 August 2009 some documents have since emerged including a letter from ARB, resolutions of the trust, a letter to the Ketua Pengarah Jabatan Hal Ehwal Orang Asli and a reply thereto. This shows that the defendants are in possession of documents belonging to the trust but have clearly refused to hand them over to the R&M.

A [30] The 1st defendant has continued to act in defiance of the R&M order. For example, on the return of the perfected deed of receipt and reassignment he states that 'my solicitors are pursuing the matter to ensure its completion as soon as possible'. He has given instructions to solicitors in respect of the 27 properties despite the fact that the R&M had been appointed (para. 31, defendant's affidavit in reply dated 13 August B 2009.)

[31] Further the defendants have retaliated against those seeking to obtain and secure the trust property. The defendants filed a counter-claim against a number of parties - (i) G. Ragumaran, solicitors for the plaintiffs; (ii) Renu Zachariah & law firm, solicitors for the R&M; (iii) John Verghis, C an agent of the R&M; (iv) Khoo Pek Lin and Folks Corporation of which the R&M is a director. The defendants have failed to obtain leave of the court to file the action against the R&M and his agents; the R&M being an officer of the court.

[32] *In conclusion, all the above points to the mismanagement of the trust by the* D *defendants. There is a lack of accountability and proper keeping of records. It appears that the trust has been run without any proper supervision and control. The situation is clearly undesirable as the trustees of a trust are acting in a fiduciary capacity. The conduct of the defendants in refusing to cooperate with the court appointed R&M is inexcusable. The trust is for the benefit of all the beneficiaries. In discharging their duties as trustees the defendants are bound by the high standards of duty of care.* E *Plainly, this is not the case. They have engaged in self-dealing. On the whole of the evidence as adduced by the affidavits there is a real risk that the trust property is in jeopardy*

(emphasis added)

For the aforesaid reasons we would dismiss the grounds advanced by the F appellants.

The DB/DC Had No Jurisdiction To Register/Set Up And Inquire Into This Complaint For The Acts Complained Of Were Acts Done By The Appellants Not In Their Professional Capacity Or Otherwise (See p. 5 Of The First Appellant's Submissions).

G

[26] The last head of submissions is contained in F in bold in the written submissions of the appellants. The quintessence of the arguments is that the complaints against them were not acts done in their professional capacity. Section 94(3) of the LPA has defined misconduct and the key words are "or otherwise which amounts to grave impropriety". A string of cases has H interpreted of these words so as to cast the net of misconduct widely. We now quote an excerpt from Malayan Law Journal, Words, Phrases and Maxims found on the Malayan Law Journal website which we now quote:

The words 'or otherwise' do not appear in s. 85 of the Legal Profession Act (Cap I *217, 1970 Ed) of Singapore but, in view of other provisions of the Act, namely ss 86, 87 and 88 the Inquiry committee and the Council of the Law Society had jurisdiction in regard to a complaint of misconduct otherwise than in a professional*

capacity; see Law Society of Singapore v. Ang Boon Kwong Lawrence [1993] 1 SLR 522. An advocate and solicitor may be disciplined even though the conduct or the act in question had nothing to do with his character as a solicitor; see Re Gopalan Nair [1993] 1 SLR 375. However, see the case of W E Balasingam v. The Bar Council [1986] 1 MLJ 334 mentioned in the note to sub-s 3(a) (infra) regarding the phrase 'conviction of a criminal offence which makes him unfit to be a member of his profession'. The court had decided that for that provision to apply, the offence must have been committed in a 'professional capacity'.

(emphasis added)

[27] The following authorities give some insight on how the court will look at the facts of each case and in applying the words "or otherwise" to construe misconduct under s. 94(3) of the LPA even though the act complained of was not specifically done in their professional capacity. In the case of *Law Society of Singapore v Heng Guan Hong Geoffrey* [1999] 3 SLR (R) 966 a decision of the Singapore High Court at p. 967 it was held:

(2) Heng's conduct as alleged in the charge under s. 83(2)(b) of the Act was dishonourable to him as a person and as an advocate and solicitor. Acting without express consent and authority and in a manner opposed to a client's interest would be grossly improper conduct. Heng's motive was to continue dealing dishonestly with the properties and such conduct and motive was not merely grossly improper conduct but was sufficient to constitute fraudulent conduct in the discharge of Heng's professional duties under s. 83(2)(b) of the Act.

(3) The standard of judgment to be applied to a solicitor's misconduct under s. 83(2)(h), as in a case under s. 83(2)(a), was a standard fixed by the court and not by the standard of peer judgment.

(4) *Unlike "grossly improper conduct" under s. 83(2)(b) of the Act, "conduct unbefitting an advocate and solicitor" under s. 83(2)(h) was not confined to misconduct in the solicitor's professional capacity but also extended to misconduct in the solicitor's personal capacity*.

(5) *Heng's whole course of conduct was calculated to enable him to obtain large sums of money from various parties through dishonest means. Such dishonest conduct would tend to bring the profession as a whole into disrepute and was clearly unbefitting of an advocate and solicitor as a member of an honourable profession*.

(6) *Where an advocate and solicitor had been proven to have acted dishonestly, whether or not leading to criminal proceedings and criminal penalties, the court would invariably order that he be struck off the roll. In the present circumstances, the only suitable penalty to be imposed was striking off the roll*. (emphasis added)

[28] We refer also to an English Court of Appeal decision in *Re Weare, A Solicitor* [1888] 2 QB 439 where it was held:

A *That a solicitor may be struck off the roll for an offence which has no relation to his character as a solicitor, the question being whether it is such an offence as makes a person guilty of it unfit to remain a member of the profession. Conviction for a criminal offence prima facie makes a solicitor unfit to continue on the roll; but the Court has a discretion, and will inquire into the nature of the crime, and will not as a matter of course strike him off because he has been convicted; and the Court considered that in the present case the nature of the offence was such that the solicitor ought to be struck off the roll.*

B

(emphasis added)

We refer to another decision of the High Court of Singapore, in *Re Gopalan Nair* [1992] 2 SLR (R) 969, and we now quote from the judgment of Chao Hick Tin J at p. 978:

C

> [19] We do not think it could be any clearer that the respondent was talking about his profession. Indisputably he was taking to task another member of his profession. As was stated in his first letter, he was raising a matter which, in his view, concerned his profession.
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> D
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> [20] Section 85(3) of the Act provides that the AG may at any time refer to the Society "any information touching upon the conduct of an advocate and solicitor in his professional capacity". We do not think it is possible, nor is it desirable, to define in what circumstances an act of an advocate and solicitor would be an act done in his professional capacity. But what we would unhesitatingly declare is that the proposition put forward by the respondent's counsel, that an advocate and solicitor could only act in his professional capacity when he is acting for a client is clearly too narrow. We would say that that is only one instance, albeit a very obvious one, where an advocate and solicitor is acting in his professional capacity. But that is not to say there could not be other circumstances.
>
> E
>
> F
>
> (emphasis added)

[29] In our view, the word "otherwise" in the phrase "in a professional capacity or otherwise" is wide enough to include acts or omissions in any capacity other than as an advocate and solicitor. In any event, the term G "misconduct" is expanded in meaning to include the circumstances set out in paras. (a) to (o) of s. 94(3) of the LPA. When you are a practising advocate and solicitor, and you act as a trustee or a director of a company and allegations of breach of trust and/or fiduciary duty and/or of conspiracy are levelled against you, then if the DC finds you guilty of conduct unbefitting H of an advocate and solicitor in relation to such trust and /or duty (see s. 94(2) of the LPA), you would certainly come within para. (o) of s. 94(3) of the LPA. Under that paragraph, conduct which is unbefitting of an advocate and solicitor comes within the definition of "misconduct".

[30] In light of our findings we dismiss the appeal of the second appellant I with costs.

[31] As to the first appellant, having given due consideration to the first appellant's role in the scheme, we are of the view that the principle of proportionality in meeting out sentences applies. The DC and the DB were harsh in their recommendation and order that the first appellant be struck off the Rolls. We refer to the judgment of the Court of Appeal in *Majlis Peguam Malaysia v. Hari Krishnan Jeyapalan* [2017] 4 CLJ 225 (Civil Appeal No. A-02(A)-16-01-2016) which followed the English decision of *Re A Solicitor* [1956] 1 WLR 1312 and the views expressed therein by Lord Goddard CJ and quoted at p. 12 of the judgment which we adopt and agree with and we now quote:

> As I have said, if there was any suggestion against the professional conduct of the solicitor, we should only interfere in the most extreme cases, but the court has carefully considered the representations made on both sides and they are quite satisfied that, bearing in mind the finding of the committee that the appellant was guilty of conduct unbefitting a solicitor, which of course is not appealed against, the order is one which is too severe considering the nature of the offence which was proved. *It was a shocking offence, no doubt, from a social point of view that a man should act in this way, but in one sense it is no worse in a solicitor than in anybody else and it is not an offence which can be passed over. We entirely agree that the committee did not think that they were bound to pass this particular sentence. The expression which they use is one very well known to judges and chairmen of quarter sessions; they very often say they cannot overlook the offence and must pass a certain sentence. Having given this case the fullest and most anxious consideration, we have come to the conclusion that we shall set aside the order striking off the Roll and substitute therefor a sentence of suspension for two years*.
>
> (emphasis added)

[32] We now make reference to a few English cases in dealing with the principles of sentencing in this regard. We refer to the Court of Appeal decision of *Bolton v. Law Society* [1994] 2 All ER 486 where His Lordship Thomas Bingham MR (as he then was) held and we quote at pp. 491-492:

> It is required of lawyers practising in this country that they should discharge their professional duties with integrity, probity and complete trustworthiness. That requirement applies as much to barristers as it does to solicitors. If I make no further reference to barristers it is because this appeal concerns a solicitor and where a client's moneys have been misappropriated the complaint is inevitably made against a solicitor, since solicitors receive and handle clients' money and barristers do not.
>
> Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal

A proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors. Only infrequently, particularly in recent years, has it been willing to order the restoration to the Roll of a solicitor against whom serious dishonesty had been established, even after a passage of years, and even where the solicitor B had made every effort to re-establish himself and redeem his reputation. If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. A striking off order will not necessarily follow in such a case, but it may well. C The decision whether to strike off or to suspend will often involve a fine and difficult exercise of judgment, to be made by the tribunal as an informed and expert body on all the facts of the case. Only in a very unusual and venial case of this kind would the tribunal be likely to regard as appropriate any order less severe than one of suspension.

D It is important that there should be full understanding of the reasons why the tribunal makes orders which might otherwise seem harsh. There is, in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of E punishment. But often the order is not punitive in intention. Particularly is this so where a criminal penalty has been imposed and satisfied. The solicitor has paid his debt to society. There is no need, and it would be unjust, to punish him again. In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat F the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most G fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission. If a member of the public sells his house, very often his largest H asset, and entrusts the proceeds to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires.

I

Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears, likely to be so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.

(emphasis added)

[33] Next we refer to another English Court of Appeal decision of *Salsbury v. Law Society* [2008] EWCA Civ 1285 and to the judgment of Jackson LJ which adopted the principles in *Bolton (supra)* which we now quote at p. 498:

[30] From this review of authority I conclude that the statements of principle set out by the Master of the Rolls in Bolton's case remain good law, subject to this qualification. In applying the Bolton principles the Solicitors Disciplinary Tribunal must also take into account the rights of the solicitor under arts. 6 and 8 of the convention. It is now an overstatement to say that 'a very strong case' is required before the court will interfere with the sentence imposed by the Solicitors Disciplinary Tribunal. The correct analysis is that the Solicitors Disciplinary Tribunal comprises an expert and informed tribunal, which is particularly well placed in any case to assess what measures are required to deal with defaulting solicitors and to protect the public interest. Absent any error of law, the High Court must pay considerable respect to the sentencing decisions of the tribunal. Nevertheless if the High Court, despite paying such respect, is satisfied that the sentencing decision was clearly inappropriate, then the court will interfere.

Having given due consideration to the facts of this case with regard to the first appellant we would order that the first appellant be suspended for five years rather than be struck off from the Rolls.

[34] We would urge the DC in recommending the punishment to be meted out to give brief reasons as to why the DC had recommended the particular punishment meted out bearing in mind the DC had options available, and the courts must be in a position to examine the same to decide whether the pendulum for punishment had swung too far in favour of striking off the Rolls.

[35] Therefore, for the first appellant, we order that:

(i) the appeal of the first appellant be allowed in part;

(ii) the order of the DB be varied to read that the first appellant be suspended from practice for a period of five years from 7 July 2012; and

(iii) No order as to costs.

[36] As for the second appellant, we would order that the appeal be dismissed with costs of RM10,000 to the respondent subject to allocator and deposit to be refunded to the second appellant.